85-1687

No. ____

Supreme Court, U.S.
FILED
APR 14 1986
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE HOME INSURANCE COMPANY,

Petitioner,

—against—

HOWARD TAYLOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Does an employer's policy or practice of age discrimination against older employees render an individual plaintiff's untimely claim of discriminatory demotion actionable?

PARTIES

The Home Insurance Company and Howard Taylor were parties to the decision sought to be reviewed here.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner The Home Insurance Company ("Home")[1] respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on November 27, 1985 affirming the judgment by the District Court.[2]

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1 As required by Rule 28.1 of this Court, The Home Insurance Company states that it is presently a subsidiary of Home Group, Inc., of which Home Group Financial Services, Inc., Home Capital Services, Inc., Thico Plan, Inc. and Imperial Premium Finance, Inc. are also subsidiaries. Furthermore, City-Ormond Management Company, Inc. and Commonwealth Insurance Company are subsidiaries of wholly owned subsidiaries of The Home Insurance Company.

2 The Fourth Circuit remanded the case to the District Court for further proceedings on the issue of willfulness in light of this Court's decision in *Trans World Airlines, Inc. v. Thurston*, ____ U.S. ____, 105 S.Ct. 613 (1985); otherwise, the judgment of the District Court was, in all respects, including the issue presented to this Court in this Petition, affirmed.

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 777 F.2d 849 and appears in the Appendix to this petition at page A-1. The final amended judgment of the United States District Court for the Western District of North Carolina, at Charlotte is not officially reported, but it appears in the Appendix to this petition at page A-23.[3]

JURISDICTION

The judgment of the Court of Appeals was entered on November 27, 1985. Rehearing was denied on January 14, 1986. This petition is filed within 90 days of the date of the denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 7(d) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 626(d), provides:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—
>
> (1) within 180 days after the alleged unlawful practice occurred; or
>
> (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.[4]

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3 Appendix references will hereinafter be designated as (A-____).

4 Section 633(b) does not apply to this case.

> Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

STATEMENT OF THE CASE

This case is a typical example of a suit brought by an individual plaintiff to recover under the ADEA. Howard Taylor, ("Taylor"), an officer and employee of Home filed a charge of age discrimination with the Equal Employment Opportunity Commission ("EEOC") on June 22, 1981 (A-52). He filed his complaint in the District Court for the Western District of North Carolina on March 1, 1982 (A-43). Jurisdiction in the District Court was based on 29 U.S.C. § 626(c) and 28 U.S.C. § 1343.

Taylor alleges in his complaint that Home demoted him in April 1979, gave him lower merit pay increases in December 1979 and 1980, failed to give him annual performance evaluations from July, 1978 to February, 1982, reduced his job responsibilities in February 1980, bypassed him in the chain of command at about the same time, did not consider him for promotional openings and demoted him again on January 5, 1981, all on account of his age (A-44, A-45). Taylor also alleges that Home's actions and inactions were "part of a pattern, policy and practice of . . . discrimination against competent management employees protected by the ADEA, so as to replace them with younger employees not protected by the ADEA."

Significantly, the only allegations of discrimination presented to the jury in this case were (1) whether Taylor's 1979 demotion was discriminatory; (2) whether Taylor's 1981 demotion was discriminatory; and (3) whether Home conducted a continuing policy or practice of discrimination against older employees between 1979 and 1981. Taylor's other allegations of discrimination were not submitted to the jury for its verdict (A-40).

The case was tried to a jury commencing October 18, 1983 and ending on October 25, 1983. The jury found that Home discriminated against Taylor on account of his age when it demoted him in 1979 and in 1981. It also found that Home conducted a continuing policy or practice of discrimination against older company employees on account of their age, from Taylor's first demotion in 1979 until his second demotion in 1981 (A-40, A-41).

On August 1, 1984, Home appealed the District Court's judgment to the United States Court of Appeals for the Fourth Circuit on the ground, *inter alia*, that the claim for the 1979 demotion was time-barred. The Fourth Circuit, however, affirmed the District Court's judgment that Taylor was entitled to recover for his 1979 demotion (A-22).

REASON FOR GRANTING THE WRIT

THERE IS AN IMPORTANT QUESTION OF FEDERAL LAW AS TO WHETHER AN OTHERWISE TIME-BARRED DEMOTION BECOMES ACTIONABLE MERELY BECAUSE THE DEMOTED EMPLOYEE FILES A TIMELY CHARGE OF AGE DISCRIMINATION BASED ON A SEPARATE DISCRIMINATORY ACT AND THE EMPLOYER HAS ENGAGED IN A POLICY OR PRACTICE OF DISCRIMINATION AGAINST OLDER EMPLOYEES.

1. The Fourth Circuit's Decision Unjustifiably Limits The Statute Of Limitations' Application In Employment Discrimination Cases

This case presents the Court with the perfect opportunity to clarify the circumstances, if any, in which an employer's pattern and practice of discrimination against older employees will render an untimely claim of discrimination actionable. The Fourth Circuit's decision in this case effectively emasculates the statute of limitations as applied to cases of discrimination brought by individual employees. If the lower court's decision

is not reversed, the ADEA's statute of limitations will not bar any past act of discriminatory demotion as long as the employee files a timely charge of discrimination based on a present violation and the employee can prove that the employer has engaged in a policy or practice of discrimination against older employees. Thus, an employer who is guilty of a pattern and practice of discrimination will not be able to invoke the statute of limitations as a defense even when the past violation is totally unrelated to the present violation. The practical effect will be to increase the number of employment discrimination cases which reach the courts.

The Fourth Circuit's decision ignores the purpose of the limitations period as enunciated by the Supreme Court in *Delaware State College v. Ricks*, 449 U.S. 250 (1980). In that case this Court held that the limitations period "guarantees the protection of the civil rights laws to those who promptly assert their rights, yet it protects employers from the burden of defending claims arising from employment decisions that are long past."

2. The Fourth Circuit Incorrectly Interpreted And Inappropriately Applied The Supreme Court's Decision In *Havens Realty Corp. v. Coleman*, 445 U.S. 363 (1982)

Reviewing the lower court's decision in this case will enable this Court to prevent the incorrect application of its decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), to future employment discrimination cases. The Fourth Circuit adopted its continuing violations test from the *Havens* decision which enabled the plaintiffs in a Fair Housing Act case, 42 U.S.C. § 3612(a), to bring an otherwise time-barred claim because the plaintiffs filed a timely complaint alleging a present violation and established an ongoing, unlawful practice which continued to affect the plaintiffs during the limitations period. The lower court incorrectly applied this test to the case at bar, however, because Taylor did not establish the pattern or practice of discrimination required by *Havens*.

In *Havens* the Supreme Court held that the defendants' continuing policy and practice of unlawful racial steering constituted a continuing violation since this practice deprived the plaintiffs of the benefits of living in an integrated neighborhood and promoting equal opportunity in housing. The Court also held, however, that one plaintiff who claimed she received false information in violation of the Act on four separate occasions did not establish a continuing violation.

The test the Fourth Circuit adopted from *Havens* was incorrectly applied to the present case because Taylor was merely demoted twice. He did not suffer the equivalent of the plaintiffs' deprivation of the benefits of integrated housing and the ability to promote equal opportunity in housing. Taylor claimed and the jury found that two discrete acts, his 1979 and 1981 demotions, were discriminatory. Home's policy and practice of discrimination was merely proven to provide a basis for inferring discrimination against Taylor.

Taylor's claims are analogous to the black tester's claims in *Havens* which the Supreme Court noted were based on "four *isolated* occasions [when] she received false information from the defendants in violation of the Fair Housing Act." [emphasis added][5] Similarly, Taylor suffered from two separate, distinct acts of discrimination, rather than the cumulative effects of the discriminatory policy engaged in by the petitioner. Hence, the application of the *Havens* test to the case at bar is error and should not be affirmed.

Instead, the Court should extend the principle of *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977) to this case. In

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5 The Supreme Court did not have the opportunity to address the exact situation that exists in the present case when it reached its decision in *Havens* since the black tester did not experience a violation of the Fair Housing Act within the 180 days before she filed suit. Petitioner submits, however, that even if the black tester had experienced such a violation, her claims based on previous violations would have been time-barred since her injury did not arise from the defendants' pattern or practice, but from each separate and isolated violation of the Act.

Evans, the Court held that a United flight attendant was not entitled to retroactive seniority for a past act of discrimination when her charge was untimely filed. Even though the employer's discriminatory seniority system had a continuing impact on the employee's pay and fringe benefits, this Court held that the employee's claim was barred because "the emphasis should not be placed on mere continuity, [but rather on] . . . whether any present *violation* exists." 431 U.S. at 558. [emphasis in original]

The Fourth Circuit's reliance on its own decisions in *Kim v. Coppin State College*, 662 F.2d 1055 (4th Cir. 1981) and *Jenkins v. Home Insurance Co.*, 635 F.2d 310 (4th Cir. 1980) to distinguish *Evans* in the case at bar is nonavailing. Both *Kim* and *Jenkins* involved a series of separate, *but related* acts of discrimination throughout the course of employment. In the case at bar, however, Taylor proved only two discrete unrelated acts of discriminatory demotion.

In *Evans* the Court held that "the critical question is whether any present *violation* exists." 431 U.S. at 558 [emphasis in original]. The mere fact that Taylor's claim for his 1981 demotion was timely should not render his claim for the 1979 demotion timely under the *Evans* test. To do so would mean that the plaintiff in *Evans* could have revived the time-barred claim for her forced resignation merely by proving another discriminatory act which was not time-barred. The Court could not have meant *Evans* to be so interpretated and should clarify its meaning by extending its application to the case at bar.

3. The Applicability Of The Continuing Violations Theory To An Untimely Claim Of Discriminatory Demotion When A Policy Or Practice Of Age Discrimination Exists Requires Clarification.

The Court below held that Taylor's otherwise untimely claim of discriminatory demotion in 1979 became actionable when he filed a timely charge of discrimination based on a second demotion in 1981. The Court decided the first demotion was part of a continuing violation because Home had engaged in a

policy or practice of age discrimination against older employees during the period between Taylor's first and second demotions. This petition presents the Court with an opportunity to determine whether the Fourth Circuit's decision was correct and to clarify the confusion in the Circuit Courts regarding continuing violations.[6]

The case law and basic common sense compel the conclusion that a demotion cannot be part of a continuing violation. A continuing violation exists if the plaintiff establishes a series of related, discriminatory acts, one or more of which fall within the 180-day limitations period. *See, e.g., Berry v. Board of Supervisors of L.S.U.*, 715 F.2d 971, 979 (5th Cir. 1983); B. Schlei and P. Grossman, *Employment Discrimination Law*, 1047 (1983). Therefore, discriminatory compensation that recurs every pay period may constitute a continuing violation because the discriminatory action continues to occur in a series of separate, but related acts throughout the course of the employee's employment. *See, e.g., Jenkins v. Home Insurance Company, supra*; *Kim v. Coppin State College, supra*. In addition, the failure to promote constitutes a continuing violation when the discriminatory promotion policy continues from day-to-day into the limitations period and other employees are actually promoted. *See, e.g., Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 924-25 (9th Cir. 1982), *cert. denied*, 459 U.S. 971 (1982).

In contrast to the payment of discriminatory wages or the failure to promote, demotions are isolated and discrete acts of discrimination that are not continuing and related. Therefore, demotions do not constitute continuing violations of the em-

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6 At least one Circuit Court has explicitly recognized the need for clarification of the continuing violations theory. The Fifth Circuit has repeatedly noted "Courts have not formulated a clear standard for determining when alleged discriminatory acts are related closely enough to constitute a continuing violation and when they are merely discrete, isolated and completed acts which must be regarded as individual violations." *See, e.g., Berry v. Board of Supervisors of L.S.U.*, 715 F.2d 971, 981 (5th Cir. 1983).

ployment discrimination laws.[7] *Mader v. Control Data Corp.*, 19 FEP Cases 1192, 1193 (D. Md. 1978); *Platt v. Burroughs Corp.*, 424 F.Supp. 1329, 1334-35 (E.D. Pa. 1976). Nevertheless, the lower court held that Taylor's first demotion was part of a continuing violation merely because the jury found that there was a policy or practice of age discrimination. Such a finding is insufficient to breathe life into a time-barred claim.

In *Berry*, the Fifth Circuit held that a work-load and salary discrimination policy that continued into the limitations period could not transform a time-barred charge of discriminatory discharge into a continuing violation. It reached this decision because the discharge was a discrete act of discrimination and the work-load discrimination was not a continuation of the original discharge. Yet, despite the fact that demotions, like discharges, constitute isolated employment decisions that are completed when they occur, the lower court in the case at bar held that an otherwise time-barred demotion followed by a second discriminatory demotion was actionable because a policy or practice of age discrimination against older employees existed.

Even if a discriminatory policy or practice can transform a time-barred claim of discriminatory demotion into a continuing violation, the pattern or practice of age discrimination proved by Taylor is not sufficient to accomplish this result. It is well established that a continuing violation exists if the employer maintains a continuous, pervasive, institutionalized system of discrimination both before and during the limitations period. Thus, courts have found a continuing violation when the plaintiff challenges an overtly discriminatory company policy such as the refusal to hire women. *See, e.g., Roberts v. North American Rockwell Corp.*, 650 F.2d 823 (6th Cir. 1981).

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7 Discharges and layoffs are similarly not continuing violations of employment discrimination laws because they are completed acts at the time they occur. *See, e.g., Berry v. Board of Supervisors, supra* at 980, and *Lawson v. Burlington Industries, Inc.*, 683 F.2d 862 (4th Cir. 1982).

In such a case the employment policy is the focus of the case, rather than the individual acts of discrimination experienced by the plaintiff as in the case at bar.

In addition, courts have found continuing violations in class action suits challenging a systematic, ongoing discriminatory employment practice. *See, e.g., McKenzie v. Sawyer,* 684 F.2d 62 (D.C. Cir. 1982). The focus in a class action suit is also on the systemwide discriminatory practice, rather than an individual charge of discrimination and the individual's claim merely provides the mechanism to investigate the continuing violation with respect to the whole class.

In the present case, however, the plaintiff did not challenge an overt, discriminatory policy as in *Roberts*. Nor is this a class action suit which attacks the employer's systematic policy, rather than individual acts of discrimination as in *McKenzie*. Instead, Taylor sought relief for his own individual demotions. He proved that Home engaged in a policy or practice of discrimination against older workers only to show age animus on the part of Home. The discrete employment decisions Home made with respect to Taylor, rather than any company system or policy, are the focus of this case. Therefore, Home's policy or practice of age discrimination is insufficient to transform an otherwise time-barred demotion into a timely cause of action. The Court should clarify the principle of continuing violation in this case.

CONCLUSION

A writ of certiorari should be issued to review the opinion and judgment of the Fourth Circuit.

Respectfully submitted,

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April 14, 1986

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1851

HOWARD TAYLOR,

Appellee,

versus

THE HOME INSURANCE COMPANY,

Appellant.

No. 84-1960

HOWARD TAYLOR,

Appellant,

versus

THE HOME INSURANCE COMPANY,

Appellee.

Appeals from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge. (C/A 82-0098-M)

Argued: April 4, 1985 Decided: November 27, 1985

Before

RUSSELL and SPROUSE, *Circuit Judges*,
and BUTZNER, *Senior Circuit Judge*.

John F. Gibbons (Kelley Drye & Warren; George R. Hodges; Moore, Van Allen, Allen & Thigpen on brief) for Appellant/Cross-Appellee; George Daly (Walter Bennett; Bennett and Lawson; Norman B. Smith; Smith, Patterson, Follin, Curtis, James & Harkavy on brief) for Appellee/Cross-Appellant.

BUTZNER, *Senior Circuit Judge:*

Home Insurance Company appeals the judgment entered in Howard Taylor's action, which is based on the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* Taylor, a Home employee, sought back and front pay, liquidated damages, and equitable relief arising from two demotions. In a pendent state claim, Taylor sought compensatory and punitive damages for intentional infliction of emotional distress. The jury found that each demotion was on account of age, that each was willful, and that Home engaged in a policy or practice of age discrimination between the first and second demotions. It awarded back pay. The district court entered judgment on the verdict, awarded liquidated damages in double the amount of the verdict, and ordered equitable relief. The court dismissed the pendent claim before the case was submitted to the jury, and Taylor assigns error to this ruling in his cross appeal.

Home challenges the sufficiency of the evidence, assigning error to the district court's denial of its motions for summary judgment, a directed verdict, judgment notwithstanding the verdict, and a new trial. It asserts that it was prejudiced by the admission of evidence of Taylor's emotional suffering. It also

contends: it could not be liable for the first demotion because the claim based on this event was untimely, the back pay award was excessive, the order for equitable relief was based on clearly erroneous factual findings and errors of law, and the cumulative effect of the district court's evidentiary rulings warrants reversal. Finally, it asserts that the court erred in instructing the jury to take evidence of emotional distress into account in determining whether Home willfully violated the Act. Finding merit in Home's final assignment of error, we vacate the judgment for liquidated damages and remand for a new trial on the issue of willfulness. In all other respects, we affirm the judgment. We find no merit in Taylor's cross-appeal.

I

Sufficiency of the Evidence

Home contends that the evidence is insufficient to support the jury's verdict that the company discriminated against Taylor because of his age when it demoted him in 1979 and again in 1981. In Lovelace v. Sherwin-Williams Co., 681 F.2d 230 (4th Cir. 1982), we explained the elements and means of proof of an age discrimination claim. There is no question that both Taylor and Home were covered by the Act and that Taylor was twice demoted. These elements of the Act need not detain us. The critical issue is whether Home demoted Taylor because of his age. Taylor has the burden of proving that "but for" Home's motive to discriminate against him because of his age he would not have been demoted. EEOC v. Western Electric Co., 713 F.2d 1011, 1014 (4th Cir. 1983). Taylor may rely on direct or indirect evidence. Also, in the initial stages of the trial, he could rely on the judicially created presumptions adapted from Title VII cases. *See Lovelace*, 681 F.2d at 238-241. The evidence was in sharp conflict. Its resolution required the jury to assess the credibility of witnesses and to draw reasonable inferences from the facts.

Taylor managed Home's Charlotte, North Carolina, regional office for nine years until his demotion in March, 1979, at age 53. Taylor's evidence showed him to be a capable and successful manager. For the two years prior to his demotion, Home rated his performance "excellent." In 1978, the manager of Home's southern region, having earlier praised Taylor's ability to train people and his consistently excellent results, noted that he was "qualified for managing a larger field office." From 1970 through 1978 Taylor's office exceeded the budgeted level of written premiums in every year and turned an underwriting profit every year but one. The overall company performance was not as good. In December, 1978, a new manager of the Southern region raised Taylor's salary while noting: "Mr. Taylor continues to perform his duties in a professional manner. Even in the face of a highly adverse rate regulatory climate Mr. Taylor has produced an underwriting pre-tax profit. Recruits and keeps a highly qualified staff."

Notwithstanding this laudatory evaluation, three months later the regional manager gave Taylor the choice of resigning, accepting a demotion to underwriter manager in Atlanta, or seeking work in the company's other regions. This proposition to Taylor was preceded by a widely circulated memorandum disparaging the leadership in Charlotte. The regional manager stated the memorandum was inadvertently circulated, but he gave Taylor no warning that his services in Charlotte were unsatisfactory. Another company official recalled that shortly before Taylor was demoted, the manager remarked: "Mr. Taylor's work has been satisfactory there . . . we have no main reasons. We are just not satisfied with him and we are going to remove him." Taylor's replacement in Charlotte was a 38 year old man with lower job appraisals.

Taylor moved to Atlanta as underwriting manager, but his tenure there lasted only from April 1979 to January 1981, when he was again demoted. Within a few months after Taylor began work in Atlanta, the office manager, age 54, was demoted and replaced by a younger man. Soon after his arrival, the new office manager told Taylor that the Atlanta

marketing manager, age 57, "was no good and too old." Speaking of Taylor, he added, according to Taylor's testimony, "in my case he said my age, we'll have to find something possibly different for you." The marketing manager was soon demoted and replaced by a younger employee. Taylor's authority and duties were curtailed, and the new office manager hired and fired some of Taylor's subordinates without consulting Taylor.

Taylor's performance was adversely affected by two other events. His wife had to undergo surgery for cancer in Charlotte while he was in Atlanta and his son was killed in an automobile accident. Taylor missed nine days of work, and for a time his distress was apparent while he was at work. On one occasion, he openly cried in his office over his son's death. Several times he was emotionally unable to deal with his subordinate's inquiries.

Nevertheless, Taylor overcame these adversities. His former supervisor observed at trial that "Mr. Taylor was beginning to accomplish exactly what we wanted in the Atlanta office." Another employee characterized Taylor as the "best [underwriting manager] probably we have every had." Their assessment was corroborated by Taylor's work. During Taylor's only full year as underwriting manager, he produced a profit. In contrast during a span of five years before and after Taylor's tenure, the Atlanta office had an underwriting loss.

In the latter part of 1980, Taylor's superior began looking for a younger man to replace Taylor without advising him of any impeding change. Early in January 1981, Taylor was called from his work and told by the regional manager that he was being transferred to a newly created position in the Charlotte office because the Atlanta office manager did not want him. In the meantime, Taylor's replacement was being introduced to the staff. When Taylor returned to his office, he found his belongings in a box outside his office door. In contrast to the reason given Taylor for the transfer, the regional manager testified that Taylor was transferred to Charlotte for "humanitiarian reasons, since Mr. Taylor's wife had moved back and

since his emotional state was still not good." Taylor's replacement, although much younger, was incapable of filling the position, and in due time he was terminated.

Taylor's new position in Charlotte was a demotion. Moreover, he was given a sales quota which a company official described as a "challenge, but for a man of your caliber, it is not unreasonable." Assignment of the quota concluded with the written proviso that "[f]ailure to meet your goal will result in your performance being considered unsatisfactory, and appropriate action will be taken." Taylor's authority to recruit new accounts was then curtailed in such a way as to make the quota unattainable. He testified that he had never seen such a goal imposed on anyone during his tenure at Home. His supervisor admitted when testifying that he had never sent a similar memo to any other employee. In June 1981, Taylor filed a complaint with the EEOC charging age discrimination. Subsequently, he was granted a raise and he has remained with the company.

In addition to showing the sequence of events in his own situation, Taylor introduced other evidence to support his claim that Home engaged in a continuing practice of age discrimination. In 1978, a new president of Home set about to change the company. He testified that the following statement attributed to him in an interview published in the *National Underwriter* was generally accurate:

> [T]he industry over the next five years will 'have to become less inbred, it will have to do what the banks did a quarter century ago,' that is, bring in smart young people.

Pressed for amplification, the president testified:

> Now, if you want to imply that that statement means that I discriminated against older people, that is sheer nonsense.
>
> Anyone who is involved in doing what I am doing, trying to change the character of a company in order to cope with the revolution this industry is facing, you have to bring in young people at some point. Older people

grow old, they retire. When you hire new people that in a—generally speaking, they are probably usually younger than the people who have been at the company, because you are building for the future.

New entries are also generally younger than the people who are going out.

The proof, however, showed that older employees were not replaced simply because they retired. Under cross-examination, the president admitted:

Q Since 1978, what percentage of the senior management of the company has been changed?

A If you take, say, a dozen people at the top, probably 90 percent.

Q And have you made those changes?

A Yes.

Q What part of that 90 percent occurred through retirement?

A A few.

Q Less than 10 percent?

A No. I think probably—oh—three or four who retired in the natural course of events.

Q And how many who were let go by you?

A Most of them.

The president's personnel policies were not confined to Home's national office. They were practiced in the regional and field offices. The company instituted a national advertising program, approved by the president, which emphasized its "fresh team of aggressive young account executives" and characterized Home "as a young, personal company committed to the future." When the president visited the Atlanta office, he asked the assembled staff, "Would you believe we have underwriters in the company who are 55 years of age?" This rhetorical question made no reference to the capabilities of the underwriters. Age, and age alone, was the object of the president's observation.

In the area where Taylor worked, the new regional manger made 100 personnel changes during the period pertinent to this case. The incumbent managers in Atlanta, age 54, in Arkansas, age 57, in Florida, age 59, and Taylor, age 53, in Charlotte, were all demoted. Only once was a manager, age 41, replaced by an older man, age 43, and that was done to promote the younger manager. The average age of employees who were promoted was 37; the average age of demoted employees was 53. The shift from old to young employees did not generate profits, and the company, the region, and the Charlotte office all suffered underwriting losses after it occurred.[1]

Home's evidence sharply conflicted with Taylor's. The president, the regional manager, and the Atlanta manager testified that age was not considered when personnel changes were made. The regional manager testified that Taylor was removed from the Charlotte office because the office was "flat rather than upbeat," "disorganized," and having a "possible morale problem." The office was said to rank poorly in 1978 and 1979 in the region, and conditions were so bad that they needed "prompt and immediate attention." He testified about deficiencies in service to independent agents and a serious backlog.

The Atlanta manager testified that the tragic death of Taylor's son in March 1980 left Taylor withdrawn and unapproachable. While Taylor described his grief as affecting his work for "a couple of months," the manager testified that he essentially had to take over Taylor's supervisory function for the balance of the year. He denied making any statement about the marketing manager's age and Taylor's age.

Home officials explained, citing examples, that adverse personnel changes affecting older employees were based on their

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1. In 1978, Home had an underwriting profit of $21 million; in 1979, an underwriting loss of $52 million; 1980, a loss of $135 million; 1981, a loss of $238 million; 1982, a loss of $265 million.

In 1979, the region's underwriting losses were $3 million; 1980, $11 million; 1981, $31 million; 1982, $64 million.

In Charlotte, where Taylor was replaced early in 1979 by a younger man, the cumulative underwriting losses from 1979 to 1982 were $9 million. This is in contrast to Taylor's management which produced a cumulative underwriting profit, 1970-78, of $5.9 million with a loss in only one year.

deficiencies and not on age. Company officials at the national, regional, and local levels attributed the underwriting losses, which followed personnel changes, to adverse conditions in the industry generally, unfavorable state regulatory policies, and the necessity to increase reserves.

Resolving this conflicting evidence, the jury answered a special interrogatory in which it found that Home discriminated against Taylor on account of his age by demoting him in 1979. In answer to another interrogatory, it found that the reasons given by Home for this action were a "pretext or cover" for its discrimination against Taylor on account of his age. The jury made similar findings in response to interrogatories pertaining to the 1981 demotion from Atlanta back to Charlotte.

In deciding Home's motions for a directed verdict, and judgment notwithstanding the verdict, the court was required to view the evidence in the light most favorable to Taylor and to draw all reasonable inferences in his favor. The court could not weigh the evidence or assess the credibility of witnesses. Abasiekong v. City of Shelby, 744 F.2d 1055, 1059 (4th Cir. 1984); Old Dominion Stevedoring Corp. v. Polskie Linie Oceaniczne, 386 F.2d 193, 197 (4th Cir. 1967); 9 Wright & Miller, *Federal Practice & Procedure* § 2524 at 543-45 (1971). The requirement that a claimant must prove that he would not have suffered an adverse employment action but for his age raises questions of causation and motive. The inferences a jury draws to determine causation must be reasonably probable. Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 241-42 (4th Cir. 1982). Determination of motive is ordinarily a function within the province of the fact finder because so much depends on an assessment of the credibility of the witnesses. A finding of motive should not be set aside by the reviewing court unless the evidence clearly compels rejection. *See* Aluminum Co. v. America, 148 F.2d 416, 433 (2d Cir. 1945); Federal Procedure, L. Ed. § 77:266 (1985). Applying these precepts, we conclude that the evidence was sufficient to sustain the jury's findings that Home discriminated against Taylor on account of his age. Taylor introduced direct and circumstantial evidence to prove

this factual issue. Acceptance of this proof depended largely on the jury's assessment of the witnesses' credibility. The district court did not err in denying Home's motions.

Home's motion for a new trial permitted the district court to weigh evidence and assess credibility. A court can exercise its discretion to grant a new trial if the verdict, even though supported by enough evidence to defeat the motion for judgment notwithstanding the verdict, is against the weight of the evidence. 11 Wright & Miller, *Federal Practice & Procedure* § 2806 at 43-45 (1973). The district court's ruling will not be reversed unless a clear abuse of discretion appears. Abasiekong v. City of Shelby, 744 F. 2d 1055, 1059 (4th Cir. 1984). After reviewing the record, we conclude that the district court did not abuse its discretion in denying a new trial.

II

Emotional Distress

Home also contends that it is entitled to a new trial because the district court committed reversible error by admitting testimony about Taylor's emotional distress resulting from his demotion, his son's death, and his wife's surgery. It also asserts that the court allowed improper cross-examination of its regional manager about emotional distress

Taylor testified about the distress caused by the occurrence and manner of his demotions, his son's death, and his wife's surgery in Charlotte while he was in Atlanta. Taylor's wife characterized the changes in his demeanor and attitude. Her only reference to her surgery was the following answer to a question about the causes of Taylor's stress:

> A In preparation to moving to Atlanta, I went to my regular doctor for a physical, discovered a lump in my right breast, put me in the hospital for a biopsy, and when I woke up the next morning I had no right breast. I'd had a mastectomy.
>
> Q Was that on account of having cancer?
> A Yes, it was.

Taylor's counsel cross-examined the regional manager concerning his perception of the suffering caused by demotion, dislocation, and the loss of a child. The court struck a similar question about cancer surgery.

The most graphic description of Taylor's emotional distress came not from Taylor's witnesses but from a former subordinate of Taylor in the Atlanta office who testified for the company. He related that Taylor "handled things rather nicely" before the death of his son. Then Taylor became so distracted that the witness could not work with him. Taylor also improperly criticized the witness's work. His frustration with Taylor was so great that he discussed quitting with the office manager, who responded as follows: "[H]e reminded me of some of the unique circumstances that Mr. Taylor had endured, primarily the passing of his son and some illness to Mrs. Taylor, and he asked me to be patient and to try to deal with it as best I could." Eventually the witness quit, blaming Taylor.

Damages for pain and suffering cannot be recovered in an action for discrimination on account of age. Walker v. Petit Construction Co., 605 F.2d 128, 129-30 (4th Cir. 1979). Consequently, evidence of emotional distress ordinarily is irrelevant and should be excluded. In this case, however, Taylor's emotional distress was inextricably linked with the issue of his 1981 demotion from his position as underwriter in the Atlanta office. Taylor admitted his performance was adversely affected by his distress over the prior demotion from the position of office manager in Charlotte, his son's death, and his wife's surgery while he was away from her. But he maintained his distress impaired his work for only a relatively short time. In corroboration, he presented evidence that he produced the only underwriting profit the Atlanta office had over a five-year span. Coworkers testified to his capable performance.

Home, in contrast, introduced evidence that Taylor's distress impaired his work throughout 1980 and that because of his constant distress he was removed as an underwriter and sent back to Charlotte for "humanitarian reasons." The jury's resolution of this conflicting evidence depended largely on their assessment of the credibility of the witnesses who testified on this issue.

Taylor's emotional distress over his demotion, his wife's surgery, and his son's death was relevant to the question whether he was demoted from his Atlanta position because of age, as he contended, or because of his impaired efficiency due to his distress, as Home contended. The probative value of the relevant evidence was not outweighed by the danger of unfair prejudice to Home. Consequently, the district court did not err by admitting it. *See* Federal Rules of Evidence 401, 402, and 403. Moreover, the district court cautioned the jury that they were not "to attempt to translate mental anguish, if any, into dollars and cents . . ." We find no cause for reversal in Home's assignment of error pertaining to Taylor's emotional distress.

III

Statute of Limitations

Home contends that no liability can attach to the 1979 demotion because Taylor filed his EEOC complaint more than 180 days after the demotion. It argues that each demotion was a discrete act and that a pattern or practice of age discrimination cannot give rise to a continuing violation theory that would permit recovery of an otherwise time-barred claim. It also asserts that the evidence was insufficient to show a pattern and practice of discrimination during the period covered by Taylor's first and second demotions.

The Act, 29 U.S.C. § 626(d), requires that a charge of age discrimination be filed with the EEOC within 180 days after the alleged unlawful practice occurred. In Havens Realty Corp. v. Coleman, 455 U.S. 363, 380-381 (1982), the Court explained how § 812(a) of the Fair Housing Act, 42 U.S.C. § 3612(a), should be applied when a continuing violation of the Housing Act occurs. Section 812(a) requires that a civil action be brought within 180 days after the alleged discriminatory housing practice occurred. The Court said:

> [F]or purposes of § 812(a), a 'continuing violation' of the Fair Housing Act should be treated differently from one discrete act of discrimination. Statutes of limitations such as that contained in § 812(a) are intended to keep stale claims out of the courts. . . . Where the challenged violation is a continuing one, the staleness concern disappears. Petitioners' wooden application of § 812(a), which ignores the continuing nature of the alleged violation, only undermines the broad remedial intent of Congress embodied in the Act . . . . Like the Court of Appeals, we therefore conclude that where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice.

The principle explained in *Havens Realty* is applicable to an action brought for age discrimination, because the Housing Act's limitation is comparable to the one imposed by the Age Act in 29 U.S.C. § 626(d). A claimant, alleging discrimination on account of age, is entitled to relief from an unlawful practice, although he did not file a charge within 180 days of its first occurrence, if the evidence satisfies the following requirements: the unlawful practice has continued into the limitation period, the claimant has filed a charge alleging the unlawful practice within 180 days of its last occurrence, and the proof sustains the charge. The proof must establish that the unlawful practice is continuing or ongoing and that it currently affects the claimant. *See* Kim v. Coppin State College, 626 F.2d 1055, 1060-61 (4th Cir. 1981).

In response to interrogatories, the jury found that Home conducted a continuing policy or practice of discrimination against older employees on account of their age from the time of Taylor's first demotion in 1979 until his second demotion in 1981. The jury also found that Home's reasons for this action were a "pretext or cover" for discrimination against older employees on account of their age.

Taylor's 1979 demotion falls within the principle explained in *Havens Realty*. He filed a timely charge based on his 1981 demotion and sustained the charge by adequate proof. He also proved by adequate direct and circumstantial evidence, which we outlined in Part I, to the satisfaction of the jury and the trial judge that Home engaged in a continuing practice of discrimination against older company employees on account of age from the time of his first demotion in 1979 to his second demotion in 1981, which was within the limitations period.

The cases which Home cited do not require reversal. We distinguished United Air Lines v. Evans, 431 U.S. 553 (1977), on which Home relies, and applied the principle of a continuing practice of discrimination in Kim v. Coppin State College, 662 F.2d 1055, 1060-61 (4th Cir. 1981),[2] and Jenkins v. Home Insurance Co., 635 F.2d 310, 311-12 (4th Cir. 1980). Other cases on which Home relies, Woodard v. Lehman, 717 F.2d 909 (4th Cir. 1983), and Lawson v. Burlington Industries, Inc., 683 F.2d 862 (4th Cir. 1982), are also distinguishable. In *Woodard*, the claimant failed to charge any discriminatory practice within the limitation period. Thus, the claimant, unlike Taylor, did not satisfy the requirement of *Havens Realty*, 455 U.S. at 381, that an unlawful practice must continue "into the limitations period." *Lawson* held that an illegal layoff does not encompass an allegation of illegal failure to rehire. Unlike Taylor's claims of two similar acts, the claims in *Lawson* were dissimilar.

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2. In *Kim*, 662 F.2d at 1060-61, we explained:

> The district court ruled that the 'continuing impact' of this alleged discrimination did not defeat the bar of the statute of limitations for college actions taken prior to 1974 . . . *Evans*, however, held that a United flight attendant was not entitled to retroactive seniority for a past act of discrimination when she had departed United for an interval. This court, in contrast, has consistently distinguished *Evans* when the discriminatory employment practice has continuously affected the complaining employees and is continuing.

IV

Damages

Taylor's salary was not cut when he was demoted. He sought compensation based on what he claimed he would have earned in salary increases, bonuses, and promotions if the company had operated under a neutral policy with regard to age. His expert testified about the average wages of Home's office managers in the region and in the nation. Also as evidence of Taylor's lost compensation, the expert testified about the salary and bonuses received by Taylor's replacement. Taylor also introduced testimony through his expert about the salary and bonuses he would have received had he been promoted to fill a vacancy in the position of regional underwriter at Atlanta, which became vacant the day he was demoted to Charlotte. Taylor showed that he had been considered promotable before his demotion. He and a coworker testified about his qualifications for the Atlanta vacancy. The expert's total of lost compensation was $123,110. The jury awarded $112,000.

Home contends that the back pay determination by the jury was excessive as a matter of law. It argues that the award was based on salary comparisons that were unsupported. It claimed Taylor's salary could not fairly be compared to that of the new Charlotte manager or the employee who ultimately filled the Atlanta vacancy. It offered testimony that the Home compensation system rendered the Charlotte comparison inaccurate, that Taylor never applied for the Atlanta job, and that the vacancy was eventually filled by the man who left it. Home also attacked the expert's salary computation for the Atlanta comparison.

The court instructed the jury on back pay in the following way:

> If you reach the question of damages, the amount of damages that is recoverable for a violation of this Act is the economic employment related losses up to the present time. It's the difference between the earnings and the benefits, if any, which the plaintiff would have received

> had he not been reduced in stature or [demoted]. That's on one side, what the plaintiff would have earned if he had carried on with the normal salary and benefits and expectations of his employment. You compare that, on the other hand, with the earnings and benefits and other advantages of employment which he has received or been able to earn with reasonable effort during the period since the demotion. So, it's the difference between what he would have got, including tenure and promotions and demotions, if any, under the original arrangement and with the original stature if he had carried on, compared with what he has been able to earn in other activities since that time. If you reach this issue, it would be appropriate, for example, to compare with what has happened to other people whom you find to be comparable to his then situation, you can compare his history in the interim with what has happened to other people whom you find to be reasonably comparable to the plaintiff in [their] stature and in capacity and in employment productivity.

The corresponding special interrogatories required the jury to determine, with respect to each demotion, "[w]hat amount, if any, is Howard Taylor entitled to recover [from the time of demotion] to the present day."

The instructions and interrogatories adequately presented the issue to the jury. *See* Dreiling v. General Electric Company, 511 F.2d 768, 774 (5th Cir. 1975). The jury could properly, in light of the instructions, assess compensation otherwise available to Taylor but for Home's age discrimination. The jury heard the merits and demerits of the Charlotte and Atlanta comparisons and apparently attached credence to Taylor's proof. We conclude that the damage award rests on sufficient evidence.

Home next argues that the court committed reversible error when it resubmitted an interrogatory to the jury. The interrogatories called for separate findings of damage arising from the first demotion to the present and the second demotion to the present. This was a reasonable way to frame the damage issue

in case of partial reversal on appeal. Unfortunately, as Taylor's counsel pointed out after the jury retired, the instruction did not make clear that the second damage figure was part of the first, not in addition to the first. Although the court reinstructed on this point, the jury returned a verdict of $112,000 on the first demotion and nothing on the second. The court clarified its instructions. After reconsideration, the jury returned a verdict of $112,000 for the first demotion and $68,000 for the second demotion. The court entered judgment for $112,000, because, as explained in the charge and set forth in the interrogatories, this sum included all damages from the time of the first demotion until "the present day."

Home insists that our holding in McCollum v. Stahl, 579 F.2d 869 (4th Cir. 1978), controls this case. *McCollum*, in which a jury found no liability but assigned damages, forbade resubmission of a special interrogatory when "there was before the court a decisive verdict, an unequivocal finding of no wrongful conduct by [the defendant]." Resubmission under the circumstances was tantamount "to a direction to find liability in order to warrant the award of damages." 579 F.2d at 871.

The district court's resubmission of the back pay interrogatory differs from the situation presented by *McCollum*. Resubmission did not direct the jury to find liability. Here, the jury had rendered its verdict on liability. Quite reasonably, the district court sought to clarify the damages attributed to each demotion without dictating the result. This was a prudent exercise of discretion to provide adequate findings for the purpose of appeal. Resubmisison did not increase the award. It simply separated its components. *See generally* 9 Wright & Miller, *Federal Practice & Procedure* § 2510.

V

Willfulness

Section 7(b) of the Act, 29 U.S.C. § 626(b), provides that a prevailing plaintiff is entitled to double damages "only in cases of willful violations." In response to special interrogatories,

the jury found that with respect to each demotion that Home's discriminatory actions were willful. Accordingly, the district court entered judgment for double damages.

On the issue of willfulness, the district court instructed the jury:

> This is the only issue on which you consider any of the evidence about actions that caused emotional distress to the plaintiff. The plaintiff has the burden here of satisfying you that the defendant discharged him knowingly, deliberately, intentionally, willfully. That means with the intent to deprive or injure. It means doing something that the defendant or its agents knew or should have known would be a violation of the plaintiff's rights under the law and without regard for the harm that might be caused by that action. A willful act is an act which the one that does it realizes is going to hurt somebody else, that it's a violation of the rights of that person and is nevertheless done. It's a deliberate act, unlawful in nature, which causes harm which is foreseeable or obvious and in disregard of the rights of the person against whom that act is taken.
>
> * * *
>
> The only issue on which you will consider any of the actions which might have caused mental anguish is the issue of willfulness. You are not to attempt to translate mental anguish, if any, into dollars and cents, but it bears, if at all, only on the willfulness questions . . .

Home objected on the ground that evidence of emotional distress is not relevant to the issue of willfulness.

After this case was tried, the Supreme Court in Transworld airways, Inc. v. Thurston, 105 S. Ct. 613 (1985), held that "a violation of the Act was 'willful' if 'the employer . . . either knew or showed reckless disregard for the matter of whether its conduct was prohibited' " by the Act. 105 S. Ct. at 625. Home's objection to the district court's instruction was well taken. Whether the employer's action causes the employee

emotional distress is not relevant to the issue of willfulness as defined in *Transworld*. Accordingly, the award of double damages is vacated, and the case is remanded for a new trial on the issue of willfulness in which the district court should give an instruction consistent with *Transworld*.

VI

Equitable Relief

In his complaint, Taylor alleged that Home "has discriminated and is continuing to discriminate against Plaintiff because of his age and in violation" of the Act. In his prayer for relief, he sought, among other things, an injunction restraining Home from engaging in unlawful practices and from continuing other unlawful practices against him. He prayed that he "be promoted to such higher position than he now holds as he would have reached absent the illegal discrimination of Defendants, together with appropriate back pay and front pay until Plaintiff reaches his rightful place."

In its decree awarding equitable relief, the court made the following findings of fact:

> That age was the principal and determining factor in defendant's decision to demote plaintiff from his position as Charlotte Branch Manager in March, 1979 . . . .
>
> That age was the principal and determining factor in defendant's later decision to demote plaintiff from his position as Atlanta Underwriting Manager in January, 1981 . . . .
>
> That plaintiff was qualified for promotion to the position of Regional Underwriting Manager in January, 1981, and would have been promoted to this position at the time it became vacant had he not been discriminatorily demoted by defendant.
>
> That after plaintiff's January, 1981, demotion, the position of Regional Underwriting Manager was replaced by the positions of (a) Regional Property Underwriting Manager *and* (b) Regional Casualty Underwriting Man-

ager, and that plaintiff is qualified to fill the position of Regional Casualty Underwriting Manager.

The court awarded, among other provisions, the following equitable relief:

> Defendant is directed to offer plaintiff the job of Charlotte Branch Manager and the job of Southern Regional Casualty Underwriting Manager (with relocation expenses), when each next becomes available, and plaintiff may decline or accept the first such offer and in either event await the other offer.

The decree also provided for corresponding front pay, bonuses, benefits, and pension adjustments.

Home assigns error to the decree, particularly with respect to the provisions pertaining to the regional underwriter's position. It argues that the court's findings are clearly erroneous and that Taylor's failure to apply for the position precludes relief.

Whether Taylor was promotable to the regional underwriter's position was litigated at the trial. The evidence discloses that prior to his first demotion, Taylor was rated as promotable to a higher position. He was a competent underwriter. Taylor and the former manager of the Atlanta office testified that he was qualified for the regional underwriter's position. Home introduced conflicting evidence. In fashioning appropriate relief, it was the function of the district court to resolve these conflicts. Its findings are not clearly erroneous, and, consequently, we must accept them. Anderson v. City of Bessemer, 105 S. Ct. 1504 (1985). Neither party requested that the issue of promotability be submitted to the jury, but, contrary to Home's contention, this omission does not require reversal. In absence of a demand for submission to the jury, the court is authorized by Federal Rule of Civil Procedure 49(a) to make the finding.

Failure to evince an interest in a vacancy has been held to preclude relief for an employee who charges age discrimination. *See* Fink v. Western Electric Co., 708 F.2d 909 (4th Cir.

1983). But *Fink*, on which Home relies, presents quite a different picture. There the company had an elaborate plan for finding vacancies for employees whose jobs were being terminated, and its efforts to assist the plaintiff were rebuffed. Here, in contrast, Home had no structured procedure for its employees to apply for high level vacancies. From the evidence, the jury and the court could reasonably infer that the regional manager filled vacancies by unilateral selection or transfer without soliciting applications. Moreover, as Taylor points out, the court could reasonably infer that his application, even if made, would have been futile in view of the reasons and manner of his summary demotion. In sum, the absence of an application does not render the district court's findings erroneous or preclude as a matter of law the relief it awarded. We conclude that the district court did not abuse its discretion in its award of equitable relief.

VII

Cross-Appeal

At the conclusion of the evidence, the district court ruled that the proof failed to sustain Taylor's claim that Home intentionally inflicted emotional distress. Upon review of the evidence, we agree with the district court's conclusion. *See* Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325 (1981) (elements of the tort). Accordingly, the district court did not err in directing a verdict for Home.

VIII

We have considered Home's other assignments of error and find in them no cause for reversal. The district court properly denied Home's pretrial motions for summary judgment because it correctly perceived genuine issues of material fact. The district court did not abuse its discretion in assuming jurisdiction over the pendent state claim for intentional emotional distress inasmuch as Taylor's emotional condition was relevant

to both his charge of age discrimination and Home's defense. *See* United Mine Workers v. Gibbs, 383 U.S. 714 (1966). The district court did not abuse its discretion in its rulings pertaining to the admission and exclusion of evidence. Home's motion to supplement the record with pretrial depositions is denied for reasons adequately stated by the district court in its order of February 7, 1985. The district court's award of double damages is vacated, and the case is remanded for a new trial on the issue of willfulness under proper instructions. In all other respects, the judgment is affirmed.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

C-C-82-098-M

HOWARD TAYLOR,

Plaintiff,

—VS—

THE HOME INSURANCE COMPANY,

Defendant.

FINAL JUDGMENT

Based upon the verdict of the jury, the partial judgment of January 25, 1984, the order, filed herewith, granting equitable relief, and the order just filed allowing attorney's fees and expenses, and upon all the evidence before the court, it is

ORDERED, ADJUDGED AND DECREED:

1. That plaintiff recover of the defendant the sum of $112,000.00 in compensation for his wrongful demotion in March, 1979, to the date of the verdict.

2. That plaintiff recover of the defendant the sum of $68,000.00 in compensation for his wrongful demotion in January, 1981, to the date of the verdict. If the judgment for $112,000.00 is upheld on appeal, this part of the judgment for $68,000.00 will become void, because the $68,000.00 covers a portion of the time as to which the jury has already awarded compensation in answer to the previous issue.

3. That plaintiff recover of the defendant an additional amount of $112,000.00 as liquidated damages.

4. Defendant is directed to offer plaintiff the job of Charlotte Branch Manager and the job of Southern Regional Casualty Underwriting Manager (with relocation expenses), when each next becomes available, and plaintiff may decline or accept the first such offer and in either event await the other offer.

5. Until such time as plaintiff is thus reinstated in one of those two positions, defendant shall pay plaintiff at the higher of (1) the same salary, benefits, and emoluments, including increases and bonuses, as have been or are being and will be paid to Southern Regional Underwriting Managers with no less seniority than plaintiff, or (2) the same salary, benefits, and emoluments, including increases and bonuses, as have been or are being and will be paid to Southern Region Branch Managers with no less seniority than plaintiff. Such emoluments shall include full participation in the Home Builder plan.

Such payments shall be reduced by such amounts as plaintiff earns, or is able to earn, with reasonable diligence, during that period.

6. Defendant shall continue to pay plaintiff on the higher of the two foregoing bases until such time as plaintiff (1) accepts reinstatement in the lower paying position or (2) declines an offer of the higher paying job, in which case defendant shall thereafter and until reinstatement pay plaintiff at the rate of the lower paying position.

7. Defendant is further ORDERED to provide plaintiff with all pension benefits which would have accrued to plaintiff had he not been illegally demoted by defendant; specifically, defendant shall consider as "earnings," for purposes of plaintiff's pension plan, the salary of the Charlotte Branch Manager until January 31, 1981, and, following that date, the higher of (1) the salary of the Charlotte Branch Manager, or (2) the salary of the Southern Regional Underwriting Officer.

Following reinstatement to one of the two positions, referred to in paragraph 4, above, plaintiff's pension and retirement benefits shall be computed and set aside, and paid upon his

retirement, on a basis commensurate with the salary plaintiff actually receives in the position[s] in which he is placed.

8. Plaintiff shall be provided office space and working conditions and equipment and stenographic and other assistance commensurate with those afforded others of comparable rank and seniority.

9. Interest shall be paid on all sums now payable, from the day the verdict was entered.

10. Defendant's motion for judgment notwithstanding the verdict is DENIED.

11. Plaintiff shall recover of the defendant the following sums as attorneys' fees, costs of paralegals and other expenses and advancements incurred in the prosecution of the case up to the present time:

Attorneys' fees	$85,656.25
Costs for paralegals	2,835.00
Costs and expenses	7,716.47
Total	$96,207.72

This 23 day of May, 1984.

JAMES B. McMILLAN

James B. McMillan
United States District Judge

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

C-C-82-098-M

HOWARD TAYLOR,

Plaintiff,

—vs—

THE HOME INSURANCE COMPANY,

Defendant.

ORDER AWARDING ATTORNEYS' FEES

On this date, the court is entering a final judgment on the jury's verdict in favor of plaintiff in this action under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* Plaintiff's attorneys have filed a petition for an award of attorneys' fees and costs pursuant to 29 U.S.C. § 626(b) and § 216(b). As the prevailing party, plaintiff is entitled under these sections of the statute to a reasonable attorneys' fee.

I.

In calculating a "reasonable attorney's fee," the court is guided by the Supreme Court's recent decision in *Blum v. Stenson*, ____ U.S. ____, 52 U.S.L.W. 4377 (March 21, 1984). Pursuant to the guidelines set forth in that opinion, the court must make an initial estimate of a reasonable fee by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. A reasonable hourly rate is generally deemed to be the prevailing market rate for the

services rendered; the burden is on the fee applicant to produce evidence that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. ____ U.S. at ____, 52 U.S.L.W. at 4379, n. 11.

The court, in its discretion, may consider a number of factors in determining a reasonable hourly rate, including the experience and special skills of the attorney, the quality of representation, the novelty and complexity of the issues, and the results obtained in the action. ____ U.S. at ____, 52 U.S.L.W. at 4380. This court will also consider the factors set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), as adopted by the Fourth Circuit in *Barber v. Kimbrell's Inc.*, 577 F.2d 216 (4th Cir.), *cert. denied*, 439 U.S. 934 (1978), and *Anderson v. Morris*, 658 F.2d 246 (4th Cir. 1981). *See also*, *Hensley v. Eckerhart*, ____ U.S. ____, 51 U.S.L.W. 4552 (May 16, 1983).

Counsel for plaintiffs have submitted affidavits showing that Mr. George Daly spent 489.3 hours working on this case; Mr. Walter H. Bennett, Jr. spent 187.5 hours; and Ms. Jean B. Lawson spent 7.1 hours. Two paralegals spent a total of 189 hours working on the case. Mr. Daly has claimed an hourly rate of $150; Mr. Bennett has claimed an hourly rate of $135; and Ms. Lawson has claimed an hourly rate of $100. Plaintiff's counsel claim an hourly rate of $15 for the time of paralegals.

In determining the reasonableness of the hours claimed and the requested rates, the court has considered the following:

1. *The special skill, experience and reputation of counsel.*— Mr. Daly has practiced law in North Carolina for eighteen years; he is well known in this community as a first-rate civil rights lawyer. He has had long and intensive experience in federal litigation at both the trial and appellate levels; and his reputation as a skilled attorney is excellent.

Mr. Bennett has been a member of the North Carolina bar for almost twelve years. He has had extensive experience as a trial lawyer in discrimination cases, and later as a state district

judge. His reputation in the community is also excellent. Ms. Lawson, a member of the Virginia and North Carolina bars, has had more than four years of experience in trial court litigation. She has been working in the field of employment discrimination law for more than one year.

2. *The quality of representation.*—Plaintiff's attorneys rendered high quality service to plaintiff. Throughout hotly contested pretrial proceedings plaintiff's attorneys persevered on his behalf. The fact that the trial was smooth and uninterrupted by delay is attributable to intense and thorough preparation by plaintiff's counsel. That high quality of representation is not disputed by defendant.

3. *The results obtained.*—The results obtained by plaintiff's counsel were exceptional. Plaintiff was thoroughly vindicated by the jury's verdict in his favor; indeed, he received the most favorable result for which he could have hoped from his claims under the Age Discrimination in Employment Act. The jury found that plaintiff had been discriminated against for a period of over three years, and it awarded damages fully commensurate with that finding. Plaintiff will receive not only monetary compensation for the detriment he has suffered, but will also ultimately be returned to his rightful place.

4. *The novelty and complexity of the issues.*—The effective prosecution of this suit required the compilation of an extensive factual record, including a considerable amount of circumstantial and direct evidence. The presentation of evidence to prove discrimination in a manner that is readily understood by judge and jury is a difficult and laborious task.

Moreover, the case was hard fought at every stage. Defendant stoutly resisted discovery, and mounted a vigorous defense to all of plaintiff's claims. Plaintiff's counsel successfully litigated complicated issues of pretrial discovery, as well as the basic facts to support recovery under the Age Discrimination in Employment Act.

(Plaintiff's claim under North Carolina law for intentional infliction of emotional distress, although not successful, was an insignificant portion of his total suit.)

5. *The preclusion of other employment by the attorneys because they handled this case.*—This factor is not significant in determining a reasonable fee in this case.

6. *Time limitations imposed by the client or the circumstances.*—This factor is not significant in determining a reasonable fee in this case.

7. *The undesirability of the case within the legal community.*—This factor is not significant in determining a reasonable fee in this case.

8. *Nature and length of the professional relationship.*—This factor is not significant in determining a reasonable fee in this case.

9. *Time and labor expended.*—Plaintiff's counsel, among them, have devoted 674.75 hours of lawyers' time and 189 hours of the time of paralegals to this case. The court finds that the time and labor expended by counsel was reasonable and fully commensurate with both the seriousness of the case and the level of their ability. The court has eliminated 2.6 of the hours claimed by Mr. Daly for time spent pursuing the state law claim on which plaintiff did not prevail, and similarly will eliminate 5.25 of the hours claimed by Mr. Bennett, and 1.30 of the hours claimed by Ms. Lawson for this same reason.

10. *Customary fee for like work.*—In light of the foregoing considerations, the court finds that a reasonable hourly rate for Mr. Daly is $135.00, and for Mr. Bennett is $115.00, and for Ms. Lawson is $85.00. The hourly rate of $15.00 requested for the services of paralegals is entirely reasonable.

Defendant has objected to the hourly rate of compensation requested by plaintiff's counsel on grounds that its own counsel, Mr. George R. Hodges, was recently compensated at a rate

of only $100 per hour for similar work representing a plaintiff, with great success, in a different case before this court. While the experience of Mr. Bennett and that of Mr. Hodges may be somewhat comparable, Mr. Daly has had considerably more experience in the field of employment discrimination law than most other attorneys in this community. In addition, plaintiff's counsel in the case to which defendant refers were given an upward adjustment of the fee award which amounted to roughly thirty percent of the total fee originally considered to be an appropriate "lodestar" amount. *See High v. Economics Laboratory, Inc.*, 576 F. Supp. 1365 (W.D.N.C. 1983).

Accordingly, the court has calculated its initial estimate of a reasonable fee in the following manner:

Mr. George Daly		
486.70 hours × $135 per hour	=	$65,704.50
Mr. Walter H. Bennett, Jr.		
182.25 hours × $115 per hour	=	$20,958,75
Ms. Jean B. Lawson		
5.80 hours × $85 per hour	=	$ 493.00
		$87,156,25
Brought forward:		$87,156.25
Less attorney fee previously paid		1,500.00
		$85,656.25
Paralegals		
189 hours × $15 per hour		2,835.00
		$88,491.25

II.

In addition to fees, plaintiff is entitled to recover costs and expenses related to the litigation. Plaintiff's counsel have submitted affidavits setting forth the following expenses paid or incurred through January 17, 1984:

Filing fee	$ 60.00
Service fee	9.00
Witness fees	120.00
Witness travel expenses	367.62
Jury psychologist fee	175.00
Transcripts	1,398.40
Travel expenses (New York deposition, Atlanta deposition, two trips to Atlanta and trip to Florida to interview witnesses)	2,513.08
Videotape costs	1,352.44
Expert witness fee	7,926.73
Copies	1,543.76
Postage, telephone, express delivery services	352.17
Consultation with psychologist (potential witness)	60.00
Total:	$15,878.20

The court finds that costs incurred for copying, telephone, videotaping, transcripts, postage and delivery, and travel, were all integrally related to counsel's work in the litigation. *Wheeler v. Durham City Board of Education*, 585 F.2d 618, 623-24 (4th Cir. 1978). Fees for non-legal consultants and experts, however, may not be recovered in this circuit as litigation expenses. *Id.* Therefore, reimbursement for plaintiff's costs and expenses will not include the following items:

Jury psychologist fee	175.00
Expert witness fee	7,926.73
Consultation with psychologist	60.00
Total:	$ 8,161.73

Subtracting $8,161.73 from $15,878.20, the court accordingly finds that plaintiff is entitled to receive from defendant $7,716.47 as reasonable costs of litigation.

IT IS THEREFORE ORDERED that defendant pay to counsel for plaintiff the following sums:

Attorneys' fees	$85,656.25
Costs for paralegals	2,835.00
Costs and expenses	7,716.47
Total:	$96,207.72

This 23 day of May, 1984.

/s/ JAMES B. MCMILLAN

James B. McMillan
United States District Judge

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

C-C-82-098-M

HOWARD TAYLOR,

Plaintiff,

—vs—

THE HOME INSURANCE COMANY,

Defendant.

ORDER GRANTING EQUITABLE RELIEF

This case was tried before a jury, which on October 25, 1983, returned a verdict in favor of plaintiff. On January 25, 1984, the court entered a partial judgment granting legal relief on the jury's verdict. Plaintiff has now moved the court for equitable relief, including reinstatement in the position of Branch Manager of defendant's Charlotte office, or, alternatively, retroactive promotion to the position of Southern Regional Casualty Underwriting Manager in defendant's Atlanta office.

Based upon the jury verdict, and all the evidence before the court, I find the following:

1. That age was the principal and determining factor in defendant's decision to demote plaintiff from his position as Charlotte Branch Manager in March, 1979, and that the discriminatory actions of defendant toward plaintiff were wilful, and not in good faith.

2. That age was the principal and determining factor in defendant's later decision to demote plaintiff from his position

as Atlanta Underwriting Manager in January, 1981, and that the discriminatory actions of defendant toward plaintiff were wilful, and not in good faith.

3. That plaintiff was qualified for promotion to the position of Regional Underwriting Manager in January, 1981, and would have been promoted to this position at the time it became vacant had he not been discriminatorily demoted by defendant.

4. That after plaintiff's January, 1981, demotion, the position of Regional Underwriting Manager was replaced by the positions of (a) Regional Property Underwriting Manager *and* (b) Regional Casualty Underwriting Manager, and the plaintiff is qualified to fill the position of Regional Casualty Underwriting Manager.

Plaintiff's motion for equitable relief is allowed as follows:

1. That plaintiff is entitled to recover of the defendant the sum of $112,000.00 in compensation for his wrongful demotion in March, 1979, to the date of the verdict.

2. That plaintiff is entitled to recover of the defendant the sum of $68,000.00 in compensation for his wrongful demotion in January, 1981, to the date of the verdict. If the judgment in paragraph 1, above, for $112,000.00 is upheld on appeal, this part of the judgment for $68,000.00 will become void, because the $68,000.00 covers a portion of the time as to which the jury has already awarded compensation in answer to the previous issue.

3. That plaintiff is entitled to recover of the defendant an additional amount of $112,000.00 as liquidated damages.

4. Defendant is directed to offer plaintiff the job of Charlotte Branch Manager and the job of Southern Regional Casualty Underwriting Manager (with relocation expenses), when each next becomes available, and plaintiff may decline or accept the first such offer and in either event await the other offer.

5. Until such time as plaintiff is thus reinstated in one of those two positions, defendant shall pay plaintiff at the higher of (1) the same salary, benefits, and emoluments, including increases and bonuses, as have been or are being and will be paid to Southern Regional Underwriting Managers with no less seniority than plaintiff, or (2) the same salary, benefits, and emoluments, including increases and bonuses, as have been or are being and will be paid to Southern Region Branch Managers with no less seniority than plaintiff. Such emoluments shall include full participation in the Home Builder plan.

Such payments shall be reduced by such amounts as plaintiff earns, or is able to earn, with reasonable diligence, during that period.

6. Defendant shall continue to pay plaintiff on the higher of the two foregoing bases until such time as plaintiff (1) accepts reinstatement in the lower paying position or (2) declines an offer of the higher paying job, in which case defendant shall thereafter and until reinstatement pay plaintiff at the rate of the lower paying position.

7. Defendant is further ORDERED to provide plaintiff with all pension benefits which would have accrued to plaintiff had he not been illegally demoted by defendant; specifically, defendant shall consider as "earnings," for purposes of plaintiff's pension plan, the salary of the Charlotte Branch Manager until January 31, 1981, and, following that date, the higher of (1) the salary of the Charlotte Branch Manager, or (2) the salary of the Southern Regional Underwriting Officer.

Following reinstatement to one of the two positions referred to in paragraph 4, above, plaintiff's pension and retirement benefits shall be computed and set aside, and paid upon his retirement, on a basis commensurate with the salary plaintiff actually receives in the position(s) in which he is placed.

8. Plaintiff shall be provided office space and working conditions and equipment and stenographic and other assistance commensurate with those afforded others of comparable rank and seniority.

9. Interest shall be paid on all sums now payable, from the day the verdict was entered.

IT IS SO ORDERED, this 23 day of May, 1984.

/s/ JAMES B. MCMILLAN
James B. McMillan
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1851

HOWARD TAYLOR,

Appellee,

versus

THE HOME INSURANCE COMPANY,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is, hereby, Home's motion to supplement the record with pretrial depositions is denied for reasons adequately stated by the district court in its order of February 7, 1985. The district court's award of double damages is vacated, and the case is remanded for a new trial on the issue of willfulness under proper instructions. In all other respects, the judgment is affirmed.

Filed Nov. 27, 1985
U.S. Court of Appeals
Fourth Circuit

JOHN M. GREACEN
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1851

HOWARD TAYLOR,

Appellee,

versus

THE HOME INSURANCE COMPANY,

Appellant.

No. 84-1960

HOWARD TAYLOR,

Appellant,

versus

THE HOME INSURANCE COMPANY,

Appellee.

Appeals from the United States District Court for
the Western District of North Carolina, at Charlotte,
James B. McMillan, District Judge

The appellant/cross-appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Butzner, with the concurrence of Judge Russell and Judge Sprouse.

For the Court,

JOHN M. GREACEN
Clerk

Filed Jan. 14, 1986
U.S. Court of Appeals
Fourth Circuit

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

C-C-82-98-M

HOWARD TAYLOR,

Plaintiff,

—VS.—

THE HOME INSURANCE COMPANY,

Defendant.

ISSUES

1. Did the Defendant discriminate against Howard Taylor on account of his age by demoting him in March, 1979?

Answer: (Yes or No) *Yes*

2. If so, were the reasons given by Defendant for this action a pretext or cover for discrimination against Howard Taylor on account of his age?

Answer: (Yes or No) *Yes*

3. If you have answered Issues 1 and 2 "Yes", were the discriminatory actions of the Defendant wilful?

4. Did the Defendant discriminate against Howard Taylor on account of his age by demoting him in January, 1981?

Answer: (Yes or No) *Yes*

5. If so, were the reasons given by Defendant for this action a pretext or cover for discrimination against Howard Taylor on account of his age?

Answer: (Yes or No) *Yes*

6. If you have answered Issues 4 and 5 "Yes," were the discriminatory actions of the Defendant willful?

Answer: (Yes or No) *Yes*

Answer Issues Nos. 7 and 8 only if you have answered "Yes" to Issues Nos. 1 and 2.

7. Did the Defendant conduct a continuing policy or practice of discrimination against older company employees on account of their age from Howard Taylor's first demotion in March, 1979, until his second demotion in January, 1981?

Answer: (Yes or No) *Yes*

8. If so, were the reasons given by Defendant for this action a pretext or cover for discrimination against older employees on account of their age?

Answer: (Yes or No) *Yes*

If you have answered "Yes" to Issues 1, 2, 7 and 8, answer Issue No. 9. If you have answered "Yes" to both Issues Nos. 4 and 5, then answer Issue No. 10.

If you have answered "No" to either of Issues Nos. 1 or 2, and "No" to either of Issues Nos. 4 or 5, then do not answer Issues Nos. 9 and 10.

9. What amount, if any, is Howard Taylor entitled to recover of the Defendant for his March, 1979 demotion to the present day?

Answer: *$112,000.00*

10. What amount, if any, is Howard Taylor entitled to recover of Defendant for his January, 1981 demotion to the present day?

Answer: *$68,000.00*

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

C-C-82-00 98-M

HOWARD TAYLOR,

Plaintiff,

—VS.—

THE HOME INSURANCE COMPANY,

Defendant.

COMPLAINT
(Jury Trial Demanded)

Plaintiff, complaining of Defendant, says:

I. FIRST CLAIM: AGE DISCRIMINATION

1. This is an action pursuant to the Age Discrimination in Employment Act ("ADEA"), as amended, 29 U.S.C. 621 *et seq.*, seeking injunctive and monetary relief. Jurisdiction exists in this Court by virtue of 29 U.S.C. 626(b)(c), and 28 U.S.C. 1343.

2. Plaintiff is a resident of Mecklenburg County, North Carolina and has been more than 40 years of age at all times mentioned herein. Defendant is a New Hampshire corporation which is authorized to do business and is doing business in North Carolina.

3. Defendant is an employer within the meaning of the ADEA.

4. Plaintiff was initially employed by Defendant in 1950. He is presently employed by Defendant as an Account Executive, in the Major Line Department in Charlotte, North Carolina.

5. Defendant has discriminated and is continuing to discriminate against Plaintiff because of his age and in violation of the ADEA. In particular, without limiting the generality of the foregoing, Defendant has discriminated against Plaintiff as follows:

(a) In April, 1979, Defendant demoted Plaintiff from Resident Secretary, functioning as General Manager of the Charlotte, North Carolina office to Resident Secretary for Underwriting of the Atlanta, Georgia office, a position of lesser responsibility and lesser pay potential;

(b) In December, 1979, and December, 1980, Plaintiff received a lower merit increase than did Defendant's similarly situated employees of less than 40 years of age, despite his performance meriting an equal or greater raise than them;

(c) Defendant did not give Plaintiff a performance evaluation from July, 1978, until February, 1982, despite Defendant's policy and practice of annual performance evaluations of employees similarly situated with Plaintiff;

(d) In about February, 1980, Plaintiff's duties as Resident Secretary for Underwriting in the Defendant's Atlanta, Georgia office were decreased by removing from his supervision the company's Alabama underwriting operation; and

(e) At about that time Plaintiff was frequently bypassed in the chain of command of normal business operations by his supervisor;

(f) During at least the past two years and continuing to date, Plaintiff has not been considered by Defendant for several promotional openings within his division, for which he was qualified; and

(g) On January 5, 1981, Plaintiff was relieved as Resident Secretary for Underwriting of the Defendant's Atlanta, Georgia office and made an Account Executive, Major Line Department, a demotion from Grade 24 to Grade 20, accompanied by lesser responsibility and authority and an absence of employees to supervise.

6. Defendant's discriminatory actions and inactions are, upon information and belief, part of a pattern, policy and practice of Defendant, during the last several years, of discrimination against competent management employees protected by the ADEA, so as to replace them with younger employees not protected by the ADEA.

7. Defendant's actions and inactions are "willful" within the meaning of 29 U.S.C. 255 and 29 U.S.C. 626(b), and have been done, taken or omitted in bad faith.

8. Defendant's discriminatory actions and inactions have proximately caused economic injury for Plaintiff, and irreparably damaged his previously excellent reputation in the insurance industry. Plaintiff will continue to suffer great, immediate and irreparable harm unless and until Defendant is enjoined as hereafter prayed, since he has no plain, adequate or complete remedy at law for the illegalities visited upon him.

9. Plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission on June 22, 1981, more than 60 days ago.

II. Second Claim: Intentional Infliction of Emotional Suffering

10. The above actions and inactions of Defendant have been done or omitted intentionally, with gross carelessness, recklessly, maliciously and outrageously. They have proximately caused Plaintiff severe psychological pain, distress, suffering and damage, and this result was or should have been foreseen by Defendant. Plaintiff is entitled to recover, as a pendent

claim under the common law of North Carolina, for this damage.

WHEREFORE, Plaintiff respectfully prays:

(a) That he have a trial by jury;

(b) That Defendant be permanently enjoined from engaging in the unlawful practices described herein, and from continuing other unlawful practices against Plaintiff;

(c) That Plaintiff be promoted to such higher position than he now holds as he would have reached absent the illegal discrimination of Defendants, together with appropriate back pay and front pay until Plaintiff reaches his rightful place;

(d) That Plaintiff recover liquidated damages as provided by law;

(e) That Plaintiff recover compensatory and punitive damages for the intentional infliction of emotional suffering upon him;

(f) That Plaintiff recover his costs, including reasonable counsel fees, and have such other and further relief as is merited in the premises.

Respectfully submitted, this the 26 day of February, 1981.

/s/ GEORGE DALY

George Daly
215 Cameron-Brown Building
Charlotte, North Carolina 28204
Telephone: (704) 333-5196

Attorney for the Plaintiff

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

VERIFICATION

Howard Taylor, being first duly sworn deposes and says that he is the Plaintiff in the foregoing action, that he has read the foregoing Complaint and that the same is true of his own knowledge and belief, except as to those matters and things therein stated upon information and belief, and as to those matters and things, he verily believes them to be true.

This the 26 day of February, 1981.

/s/ HOWARD TAYLOR
Howard Taylor

Sworn to and subscribed before me
this 26 day of February, 1981.

DOROTHEA KAY BATTEN
Notary Public
My Commission Expires:
July 12, 1983

Filed U.S. District Court
W. Dist. of N.C.
Mar. 1, 1982

CHARGE OF DISCRIMINATION

Charge Number: 045811054 Amended

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Name: Mr. Howard Rhys Taylor

Street Address: 4030-H Providence Road

City, State, and Zip Code: Charlotte, North Carolina 28211

County: Mecklenburg

Home Telephone Number: (704) 365-1972

NAMED IS THE EMPLOYER WHO DISCRIMINATED AGAINST ME:

Name: Home Insurance Company

Street Address: 6230 Fairview Road

City, State, and Zip Code: Charlotte, N.C.

Telephone Number: 704-364-2200

Cause of Discrimination Based on My: Age (55)

Date Most Recent or Continuing Discrimination Took Place: January 4, 1981

THE PARTICULARS ARE:

I. I have been employed by Home Insurance Company since October 1950. I am currently classified as Assistant Secretary, Account Executive, Major Lines Department. During April 1979, I was demoted from Resident Secretary, functioning as General Manager, of the Charlotte, N.C. office, to Resident Secretary for Underwriting at the Atlanta, Ga. office.

Home Insurance employs over 100 people in North Carolina.

II. I asked Norman Bressman, Senior Vice President, why I was being demoted and he stated that they were not happy with Charlotte operations.

III. I believe I was demoted due to my age (55) inasmuch as:

A. Prior to my demotion I was not advised of any deficiencies within my area of operation or supervision.

B. My latest evaluation, dated 7/18/78, was excellent.

C. Other management officials, above the age of 40, within the region have been demoted.

D. I was replaced by Tom Cowell, in his 30's.

I. I received a lower merit increase than younger employees during December 1979.

II. Management did not advise me as to why my increase was less than younger employees.

III. I believe I received a lower merit increase than younger employees due to my age (55) inasmuch as:

A. I believe I was recommended for a 10-15% merit increase by Robert Brooks, my former supervisor.

B. I received a 7% increase.

C. To the best of my knowledge younger employees received the merit increase their supervisors recommended.

I. I have not received a performance evaluation since July 1978.

II. I have not asked why I have not been evaluated.

III. I believe I have been denied a performance evaluation due to my age (55) inasmuch as:

A. Corporate policy requires that all employees be appraised at least annually.

B. I have not been evaluated since July 1978.

C. To the best of my knowledge employees below the age of 40 have been appraised on an annual basis, whereas some of those over 40 have not received annual appraisals.

I. During the period December 1979 thru 1980, I was denied the usual management responsibilities of supervising staff and recommending personnel actions for subordinates. I was also relieved of my duties as supervisor of Alabama Underwriting Operation.

II. Management offered no explanation for any of these actions.

III. I believe I was discriminated against due to my age (55) inasmuch as:

A. Younger supervisors were assigned to all the customary supervisory responsibiities, which I was denied including recommending appropriate personnel actions for subordinates.

B. Supervision of Alabama Underwriting Operations was taken over by the Alabama Office.

I. I was demoted from Underwriting Officer for Georgia (Grade 24) to Account Executive, Major Line Department (Grade 20) during January 1981.

II. The reason given for my demotion was that John Goss did not like my work.

III. I believe I was demoted due to my age (55) inasmuch as:

A. Prior to my demotion my work was not criticized.

B. I was replaced by Robert London in his mid 30's.

I. I was denied a merit increase during January 1981.

II. There was no reason given for this action other than the fact that I was being moved from Underwriting to Account Executive.

III. I believe I was denied a merit increase effective January 4, 1981 due to my age (55) inasmuch as:

A. Younger employees received merit increases.

B. Charles Shuford, Robert Brooks, Henry Trent all in their mid 50's were denied merit increases.

As a result of the aforementioned demotions, I have a decreased salary potential.

Originally filed June 22, 1981

I declare under penalty of perjury that the foregoing is true and correct.

Date: 7/29/81 /s/ HOWARD R. TAYLOR

Charging Party

CHARGE OF DISCRIMINATION

Charge Number: _____

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Name: Mr. Howard Rhys Taylor

Street Address: 4030-H Providence Road

City, State, and Zip Code: Charlotte, North Carolina

County: Mecklenburg

Home Telephone Number: (704) 365-1972

NAMED IS THE EMPLOYER WHO DISCRIMINATED AGAINST ME:

Name: Home Insurance Company

Street Address: 6230 Fairview Road

City, State, and Zip Code: Charolotte, N.C.

Telephone Number: (704) 364-2200

Cause of Discrimination Based on My: Age

Date Most Recent or Continuing Discrimination Took Place: On or about February, 1981, and continuing to date.

THE PARTICULARS ARE:

1. I am presently, and have been for the past 30 years, employed by the Home Insurance Company, a company engaged in interstate commerce which regularly employees over 100 persons.

2. In April, 1979, I was Resident Secretary (functioning as General Manager) of the Company's Charlotte, North Carolina office. I was at that time transferred to the Company's Atlanta, Georgia office as Resident Secretary for Underwriting, a lower position with lesser responsibilities and lesser pay

potential. Since that time I have received a lesser merit increase than I deserved (January, 1980, and January, 1981), not been given an annual appraisal (continuing, since July, 1978), had my duties in Atlanta decreased by the removal of my supervision of our Alabama underwriting operation (1980), bypassed in the chain of command of normal business operations by my supervisor, John Goss (since about December, 1979), not been considered for at least three promotional openings within my division, for which I was qualified, on January 5, 1981, I was taken off my job, offered a lesser position, and told to take leave to think about it, and, on or about February 1, 1981, I was transferred to Charlotte, given no employees to supervise, and given less responsibility and authority.

3. I am now 55 years of age. The foregoing discriminations have been done to me on account of my age. All of the above incidents are part of a pattern, and practice of discrimination against me on account of my age.

I declare under penalty of perjury that the foregoing is true and correct.

Date: 6/22/81

/s/ HOWARD RHYS TAYLOR
Charging Party

Supreme Court, U.S.
FILED
MAY 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1687

In The

Supreme Court of the United States

October Term, 1985

THE HOME INSURANCE COMPANY,

Petitioner,

— against —

HOWARD TAYLOR,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE DALY
Suite 226, One North McDowell
101 North McDowell Street
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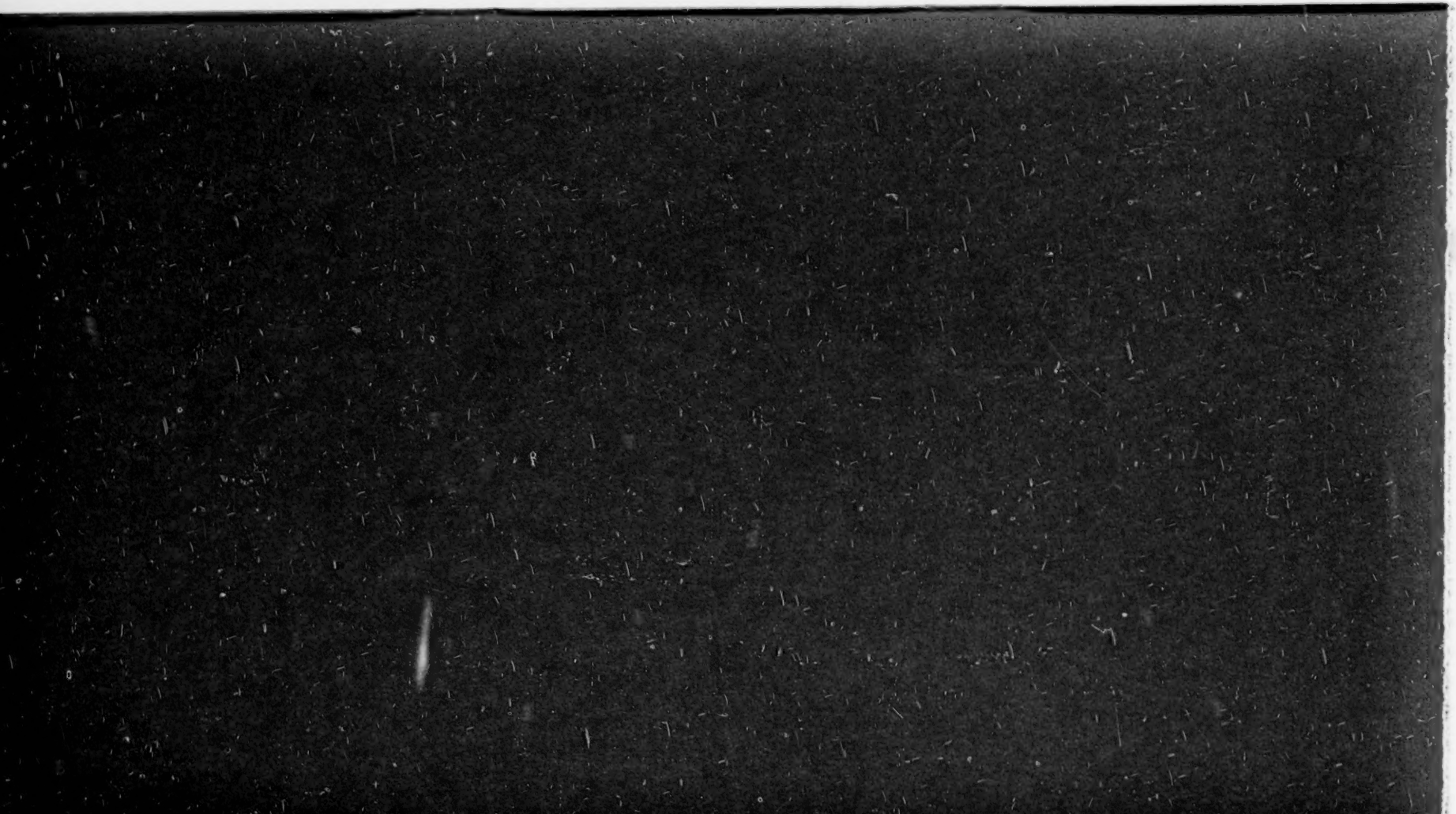

QUESTION PRESENTED

Does the "continuing violation" doctrine of Havens Realty Co. v. Coleman, 455 U. S. 363 (1982), allow recovery in an Age Act case for an otherwise time-barred demotion, when the jury finds that this demotion was done pursuant to a pattern and practice of discrimination against older employees, and another demotion pursuant to this policy and practice has occurred within the limitation period?

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No. 85-1687

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE HOME INSURANCE COMPANY,

Petitioner,

--against--

HOWARD TAYLOR,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Howard Taylor respectfully prays that the Court decline to grant a Writ of Certiorari.

STATEMENT OF THE CASE

The pertinent facts are accurately summarized in the opinion of the Circuit Court. Pet. Cert., A. 4-8. The facts bearing particularly on the "pattern and practice" aspects of the case appear at Pet. Cert., A. 6-8.

SUMMARY OF ARGUMENT

Petitioner argues that the unlawful policy and practice of age discrimination was not established by the proof. This argument is meritless because Petitioner does not claim that the jury's finding of policy and practice was clearly erroneous.

Petitioner also argues that demotions are inherently incapable of being done pursuant to an unlawful policy or practice. This extreme proposition does not make sense.

ARGUMENT

In Havens Realty Corp. v. Coleman, 455 U.S. 363, (1982), this Court held that if a violation of the Fair Housing Act, 42 U.S.C. 3604, occurs within that Act's limitation period, then violations which occurred beyond the limitation period are actionable if they occurred pursuant to the same policy or practice as did the violation within the limitation period. 455

U.S. at 380-81. In the case at bar the Circuit Court, noting the similarity between the limitation provision of the Fair Housing Act, 42 U.S.C. 3612(a),[1] and that of the Age Act, 29 U.S.C. 626(d)(1),[2] applied Havens to the Age Act. Pet. Cert., A. 12-14. Petitioner does not challenge this holding. Rather, the substance of its argument is that the Circuit Court incorrectly applied Havens to the facts of the present case. See, e.g., Pet. Cert., 5. Petitioner makes two separate arguments to this end:

1. that no unlawful policy or practice was established by the proof; see, e.g., Pet. Cert., 5-6; and

2. that demotions are inherently

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[1] "A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred." 42 U.S.C. 3612(a).

[2] "[A] charge shall be filed within one hundred and eighty days after the alleged unlawful practice occurred." 29 U.S.C. 626(d)(1).

incapable of being done pursuant to an unlawful policy or practice; see, e.g., Pet. Cert., 8-10.

The first argument fails because the question of whether Defendant "conduct[ed] a continuing policy or practice of discrimination against older company employees" from the time of Respondents' first demotion (which was outside the limitation period) until his second demotion (which was within the limitation period) was put to the jury[3] and answered, "yes." Pet. Cert., A. 40, 41. Since Respondent does not claim that this finding of ultimate fact was clearly erroneous, the argument that the proof failed to show an unlawful policy of practice is meritless. Rule 52(a), Fed.R.Civ.P.; see, Anderson v. City of Bessemer City, ____ U.S. ___, 84 L.Ed.2d 518 (1985). Alternatively, there was ample

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[3] Petitioner does not assert that the instructions under which this issue was submitted to the jury were erroneous.

evidence of an unlawful policy or practice of age discrimination. Pet. Cert., A. 6-8.

Petitioner's second argument, that demotions are inherently discrete and isolated acts, is also not persuasive. The two demotions of Respondent were done by the same Regional Manager. This man made a hundred personnel changes in a period of two years and only once was a younger person replaced by an older person, and that was done to promote the younger person. Pet. Cert. A. 8, 4. The evidence shows that the demotions of Respondent were in fact not isolated and discrete acts, but part of a policy and practice of demoting older employees, which emanated from the President of the company and was carried out by the Regional Manager. Petitioner argues that a demotion is more akin to a lay-off or a discharge than to a promotion, and therefore is inherently not a continuing violation. Petitioner cites several

cases which it claims establish that, while failures to promote can be continuing violations, discharges and lay-offs cannot be continuing violations. Williams v. Owens-Illinois, Inc., 665 F.2d 918, 924-25 (C.A. 6, 1982), cert. den. 459 U.S. 971 (1982) (promotions); Berry v. Bd. of Supervisors of LSU, 715 F.2d 971, 981 (C.A. 5, 1983) (discharge); Lawson v. Burlington Industries, Inc., 683 F.2d 862 (C.A. 4, 1982) (lay-off). Even if these cases did draw such a bright-line rule -- which they do not -- they could not be squared with Havens. If all the black people at a plant are laid off, despite seniority, and all the white people retained, on day 191, the blacks are rehired on day 181, the blacks are again laid off on day 171, and both lay-offs occurred because the boss thought blacks were inferior, Havens would allow a claim of continuing violations. There would be an unlawful policy or practice and

a violation within one hundred and eighty days. The form of the personnel action is not determinative of whether an unlawful policy or practice exists. Neither lay-offs nor demotions are inherently isolated and discrete acts.

CONCLUSION

Upon the reasoning and authority stated, Respondent respectfully requests that no Writ of Certiorari be issued.

Respectfully submitted, this the 30 day of April, 1986.

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CERTIFICATE OF SERVICE

George Daly certifies:

1. I am a member in good standing of the bar of this Court, having been admitted on October 12, 1971.

2. Today I personally caused to be deposited in a United States mailbox, first-class postage prepaid, the following numbers of copies addressed to the following opposing counsel:

Raymond L. Vandenberg - 3 copies
425 Park Avenue
New York, New York 10022

John Gibbons - 1 copy
101 Park Avenue
New York, New York 10178

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3. All parties required to be served have been served.

This the 2 day of May, 1986.

George Daly
GEORGE DALY